2396

4

United States
Circuit Court of Appeals
For the Ninth Circuit.

COLUMBIA RIVER PACKERS ASSOCIATION (a corporation),

Appellant,

vs.

H. S. McGOWAN, ERICK LINDSTROM and **J. P. COYLE,**

Appellees.

MOTION FOR ISSUANCE OF A NEW CITATION AND APPELLANT'S REPLY BRIEF.

Appeal from the United States District Court for the Western District of Washington. Southern Division.

Hon. GEORGE DONWORTH, Judge.
Hon. EDWARD E. CUSHMAN, Judge

G. O. FULTON, Astoria, Oregon, Solicitor for Appellant.
DORR & HADLEY, Seattle, Wash.
WELSH & WELSH, South Bend, Wash. } Solicitors for Appellees.

The J. S. Dellinger Co. Printers Astoria

United States
Circuit Court of Appeals
For the Ninth Circuit.

COLUMBIA RIVER PACKERS ASSOCIATION
(a corporation),

Appellant,

vs.

H. S. McGOWAN, ERICK LINDSTROM and **J. P. COYLE,**

Appellees.

Comes now the above named appellant, by its solicitor, G. C. Fulton, and hereby moves the Court for an order directing the issuance of a new citation herein directed to the United States Fidelity and Guaranty Company, the surety on the injunction bond of appellant and against whom a judgment was entered in the Court below, as such surety.

In support of this motion, appellant avers that as it and its solicitor was advised at the taking of the appeal herein, said, The United States Fidelity and Guaranty Company, was not a proper party to this appeal and it was not proper to serve it with citation. That this appeal was taken and is prosecuted in good faith and with the sole intent to have this cause fairly submitted to this Court.

G. C. FULTON
Solicitor for Appellant

The Appellant will submit the above motion to the above entitled Court at the coming in of said Court Monday, September 14th, 1914, or as soon thereafter as same can be heard.

Argument on Motion of Appellees to Dismiss the Appeal and Cross Motion of Appellant for a New Citation.

Counsel for appellees have submitted a motion to dismiss the appeal upon the sole ground that the United States Fidelity and Guaranty Company, the surety on appellant's injunction bond, and against whom the Court below entered a judgment in the sum of Twelve Thousand Dollars ($12,000), was not served with citation, nor its interest severed. No direct authority is submitted in support of this contention, we therefore assume they were unable to find any.

A recent case, involving this very question of practice, was before the United States Circuit Court of Appeals for the Fourth Circuit, **Gilbert vs. Hopkins, et al,** 198 Federal 849-51. In that case the plaintiff filed a bond with surety for costs in the lower Court. Judgment was entered in favor of defendant, and against plaintiff and his surety for costs on the surety bond. The plaintiff appealed but failed to make his surety a party to the appeal. The defendant filed a motion in the Appellate Court to dismiss the appeal, assigned among other reasons,

"that the Surety Company on the bond of the plaintiffs in error, for costs in the court below, is not joined as plaintiff in error." The Court did not consider this motion of sufficient importance for any comment. The motion was denied as being without merit.

No advantage can be obtained to appellees by making the Surety Company a party to this Appeal, for the reason it is appellant's surety on its supersedeas bond, and appellees were satisfied with such surety at the time the appeal was perfected. Therefore, nothing can be gained to appellees by making such surety a party to this Appeal.

Johnson vs. Trust Co. 43 C. C. A. 458.

While we are clearly of the opinion that appellees' motion is without merit, as a matter of precaution, and to fully protect appellant's right, we have submitted a motion requesting this Court to issue a new citation, bringing in the United States Fidelity and Guaranty Company a party to this Appeal. The power and jurisdiction to issue such new citations, as well as the duty so to do, has been so frequently discussed and firmly established as to require no argument whatever.

Martin vs. Buford, et al, 176 Federal 554
Teal vs. Chesapeake Bay Co., 204 Federal 914.
Browning vs. Boswell, 209 Federal 788-91

Dodge vs. Knowles, 114 U. S. 430
In re Chitwood, 165 U. S. 443
Thomas vs. Green Co. 146 Fed. 969-10.

And the fact that the time has expired for suing out the writ, does not deprive this Court of such right.

Gilbert vs. Hopkins, 117 C. C. A. 491 (198 Fed. 849)
Teal vs. Chesapeake & O. Ry. Co., 204 Fed. 917
Nome and Sinook Co. vs. Amer. Mercantile Co. 187 Fed. 929.

It is unnecessary to say that this appeal is taken in good faith, the large costs thereof, the labor necessary to perfect the same, are facts conclusive of our honesty, sincerity and good faith. We had before us when we perfected this appeal the case of Gilbert vs. Hopkins, supra holding that the surety was not a proper party to this appeal. We relied upon the ruling in that case. If this Court should conclude that we were in error, and that it is a matter of discretion in this Court as to whether a new citation should issue, we submit that our misapprehension in this regard is sufficient grounds for allowance of such new citation. This was held sufficient grounds in Browning vs. Boswell, 209 Federal 788-791.

APPELLANT'S REPLY BRIEF.
JURISDICTION.

On page 31 of appellees' brief, we find the following statement: "Having effectively used the process and machinery of this Court for four years to keep appellees out of their fishing grounds and to appropriate unto itself their fish and the profits therefrom, appellant now insists that the Court is without jurisdiction in the premises, and that its motion to dismiss the suit should have been granted, notwithstanding the cross bills and demands on behalf of the defendants."

And on page 51 of their brief is the following statement: "For a stronger reason, the plaintiff cannot himself raise the objection when the suit takes such a turn that it becomes desirable for him to get out. This rule has been applied in the case of a cross bill."

Evidently, the above is an attempt to have the Court believe that the motion of appellant to dismiss this case was not urged until after four years had expired and after the appellant had effectively used the process of this Court during that time, and that appellant employed the machinery of the Court until it discovered a turn in the case not to its liking and then suggested this motion. Nothing could be further from the facts. Before any testimony was taken, and immediately upon the publication

of the opinion of the case of the State of Washington v. State of Oregon, the appellant filed its motion to dismiss this case, upon the ground that the Court below did not have jurisdiction, for the reason that the premises in controversy were within the boundaries of the State of Oregon. The appellees successfully resisted this motion. In the light of the record here it ill becomes appellees to urge before this Court that the appellant effectively used the process and machinery of the lower Court until its purpose was subserved and then suggested the motion to dismiss. The record is against any such contention.

The suggestion is made that we do not appreciate the distinction between venue and jurisdiction. We confess we do not, if our motion to dismiss this case upon the ground that the premises were in Oregon raises a question of venue only, and not jurisdiction. Our contention is, and always has been, that this motion presented a question of jurisdiction. It is frankly admitted by counsel for appellees that the State of Washington had ever taken and assumed the exclusive jurisdiction over Sand Island prior to the boundary line decision, and appellees also concede that the officials of Washington would not permit fishing apparatus to be employed thereon unless licensed by the State of Washington, and because appellant accepted the contention of Washington officials and brought this suit in the lower Court

and alleged the premises in controversy to have been within the territorial boundaries of the State of Washington, it is accused of bad faith because after the Supreme Court of the United States held that the state's contention was wrong, it asked for a dismissal of the case for lack of jurisdiction. We had presumed it never would be contended that a district court in Washington had jurisdiction to determine the title to real estate in Oregon, or to issue injunctions or restraining orders pertaining to land titles in Oregon. The situation in which appellant has found itself is very easily explained and very easily understood. It could have obtained no relief in Oregon, had it instituted this suit there. The Washington officials would have paid no attention to any order or decree of a Court in Oregon. As soon as appellant discovered that Sand Island was in Oregon, it seasonably and in good faith suggested this to the Court below. That Court held that it had nevertheless jurisdiction of this case, and that it had the power to determine title to real estate in Oregon. We cannot agree to the doctrine that a mistake in an allegation of a fact in a complaint when shown to have been a mistake could give a Court in Washington jurisdiction to determine the title to real estate in Oregon. The Court below was powerless to enforce its decree, for the simple reason it had no jurisdiction. There are many instances where a mistaken allegation of a fact may give the Court power to take cognizance of the suit where only a question of venue is at issue,

but this cannot be true as to jurisdiction of the Court. A Court has jurisdiction as a matter of law, and parties cannot stipulate jurisdiction in any Court, that as a matter of law it does not have.

EXCLUSIVE FISHERY.

We regret that we are compelled to call the Court's attention to a clearly erroneous statement in appellees' brief.

On page 62 of appellees' brief is the following statement: "Realizing the untenability of the claim in the lower Court that its shore-ownership gives appellant an exclusive right of fishery in the river, counsel tries to drop that broad contention in his appeal brief and now avers that he never did make it; yet with the same breath reiterates it time and again."

That portion of our brief printed on pages 45, 46, 47, 48 and 49 is practically copied from our brief filed in the Court below. In the Court below, we did not contend that the shore owner had the exclusive right of fishery, or had any right of fishery superior to any person. Counsel for appellees always contended that the effect of our complaint was to make such claim, but they never boldly contended before that counsel for the appellant ever made such contention. We submit there is no such contention in the complaint. No relief is asked which

could give the appellant any exclusive right of fishery. All that the appellant seeks by this suit is to enjoin the appellees from constructing, operating and maintaining fixed structures in front of its shore line. It made no difference to appellant the use of these fixed structures, or to what use the appellees intend to apply same. The appellees answered that they desired to employ these fixed structures for fishing operations. Appellant's answer to that was, that it did not make any difference for what purpose it was proposed to use these structures, and that is still our contention. If appellees had the right to place fixed and permanent structures in front of appellees' land, it would surely make no difference to appellant the purpose for which such structures were proposed to be used or employed. Therefore, the question of fish and fishery rights are mere incidents to this suit. One of the reasons why appellant contended that the fixed structures should be removed was that it desired to employ its premises in launching seines therefrom and landing the same on its shore.

Counsel for appellees concede the law to be that it has such right as an incident shore ownership. In this wise, the question of fish and fishery rights has arisen in this case.

EAGLE CLIFF CASE.

Counsel for appellees make the following astonishing statement, page 65 appellees' brief:

"As we read the record in that case (referring to the Eagle Cliff case), the point at issue must have been whether the set-nets there in controversy were constructed according to law; not, as here, whether they were constructed at all."

With due respect to counsel for appellees, we wish to say that no such contention was made by either party to that suit, and nothing in the record can be found that will justify any such contention. The contention there was exactly the contention here, namely, was the owner of a license to operate a set net permitted to locate, operate and maintain a set net thereunder in front of the shore lands of another without the riparian owner's consent at any point between the line of low water and the line of navigability? That was the only question presented and passed upon in the Eagle Cliff case, and it was held in that case that a set net could be so constructed, operated or maintained, and that the shore owner or riparian owner was entitled to an injunction enjoining and restraining the construction, operation and maintenance of any such structure. That was all there was to the Eagle Cliff case. The identical question involved in this case was squarely and fairly presented to the Supreme Court of the State of Oregon in the Eagle Cliff case, and there was no other proposition involved other than the contention was made that the interlocutory decree

entered in this case was res adjudicata of the Eagle Cliff case.

At the hearing of this case, with the permission of the Court, we will submit an abstract of record of the Eagle Cliff case, together with the briefs of the respective attorneys on each side. The Eagle Cliff case, as we understand the law, is absolutely decisive of this case.

We do not understand that the question presented here has ever been passed upon by the Supreme Court of the State of Washington; but it matters whether it has or has not. The Supreme Court of the State of Oregon has passed upon this question, and we have a right to invoke the doctrine and rule announced by that Court as decisive of this case.

PLEADING CUSTOM.

Counsel for appellees,as we understand it, do not dispute the rule that local custom, in order to be taken advantage of, must be pleaded, but we are told that although we object to the introduction of any testimony or evidence of a local custom, that our objections were not sufficient. We are not told why, but the general statement is made that we made no such objection. We wish to call the Court's attention in this regard, at page 471, Volume II, Transcript of Record. We objected to this question

upon the ground that the question was incompetent. The question is again asked of the same witness at page 472, and the objection is made that the question is incompetent and immaterial. In fact, whenever this question was propounded in any way, shape or form, it was met with the objection of the appellant that it was incompetent, irrelevant and immaterial. It seems to us that this objection was sufficient.

AMENDMENT.

Counsel for appellees have asked the Court to permit an amendment to their pleading. The character of the amendment is not stated, but, as we understand it, it is desired to amend their pleading, so as to allege this local custom. While we are always quite willing that the pleadings should be amended to conform with the facts, the difficulty here is that there are no facts, no testimony upon which an amendment can be based. If the Court is of the opinion that there is any evidence in that regard, we have no serious objection to an amendment. Our contention is and was that the evidence offered on behalf of appellees failed to show any local custom.

DAMAGES.

We have a very high admiration for the learning and ability of counsel for appellees, and our ad-

miration is surely justified in the magnificient manner in which it is attempted by them to reconcile the rule for the measure of damages announced by Judge Donworth with the rule for the measure of damages adopted by Judge Cushman. Nothing but genius of the very highest order could possibly suggest a scheme which will reconcile these two decisions, and whether they have successfully done so, we, at least, give them due credit for their magnificient effort.

We respectfully submit that the judgment of the lower Court ought to be reversed.

G. C. FULTON,
Solicitor for Appellant.